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Supreme Court of the United States

OCTOBER TERM, 1937

No. 322

WESTERN LIVE STOCK, A PARTNERSHIP COMPOSED OF FRAZIER BIGGS AND D. F. BIGGS, APPELLANT,

vs.

BUREAU OF REVENUE AND JOHN A. BINGAMAN, COMMISSIONER OF REVENUE

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW MEXICO

FILED AUGUST 16, 1937.

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[fol. 1] **IN DISTRICT COURT OF SANTA FE COUNTY**

WESTERN LIVE STOCK, a Partnership Composed of Frazier Biggs and D. F. Biggs, Plaintiff, Appellee

vs.

BUREAU OF REVENUE and JOHN A. BINGAMAN, Commisioner of Revenue, Defendants, Appellants

AMENDED COMPLAINT—Filed November 14, 1935

Plaintiff states:

I. That plaintiff, Western Live Stock, is a partnership composed of Frasier Biggs and D. F. Biggs, having its principal and only office and place of business at 126 South Third [fol. 2] Street in Albuquerque, Bernalillo County, New Mexico; that Frasier Biggs is a resident of Albuquerque, Bernalillo County, New Mexico, and D. F. Biggs is a resident of Chicago, Cook County, Illinois.

II. That the defendant, Bureau of Revenue, is created by Chapter 9, Laws of 1935, and vested and charged with all powers and duties conferred and imposed upon the State Tax Commission by the Emergency School Tax Act of 1934, being Chapter 7 of the Laws of 1934, Special Session; that John A. Bingaman is the duly appointed, qualified and acting Commissioner of Revenue provided for by Chapter 9.

III. That plaintiff is now, and for some years last past has been, the owner and publisher of a livestock magazine, issued monthly, and known and designated as "Western Live Stock"; that said magazine is wholly prepared, edited and published in Albuquerque, Bernalillo County, New Mexico, and that plaintiff's only office and place of business is in said city, county and state; that said magazine has a general circulation and distribution throughout New Mexico and other states comprising the United States of America; that said magazines are distributed through the United States mails from Albuquerque, New Mexico, to its paid subscribers located and residing in New Mexico and in other states of the Union.

IV. That said magazine, "Western Live Stock," receives and publishes under contract and for hire advertisements

to be published in its monthly issues, including advertisements by advertisers residing and located in states other than New Mexico, who advertise products, manufactured elsewhere than in New Mexico, to be sold, shipped and transported direct from them to the customer in the original packages as when manufactured; that said foreign advertisements (by this term referring to advertisements of the [fol. 3] type last above described) are obtained by plaintiff both through personal solicitation on the part of plaintiff, its officers and agents, either through the mails or by personal calls on said foreign advertisers in states other than New Mexico, and through advertising agencies located in states other than New Mexico; that the contractual relations between plaintiff and its foreign advertisers (effected either directly by plaintiff or through advertising agencies) are entered into in foreign states, and all advertising cuts, mats, material, information, intelligence and copy are sent to plaintiff by said foreign advertisers residing outside of New Mexico; that payment for said advertising is sent to plaintiff from foreign states; that said contracts for advertising between plaintiff and foreign advertisers and the actual insertion of advertisements in plaintiff's magazine by foreign advertisers are brought about in order to promote and aid the sale, in original packages, and in states other than where manufactured and produced and stored, of products and merchandise handled by said foreign advertisers; that said contracts and advertisements are adopted as a direct means and aid in advertising and giving information on products and merchandise in interstate commerce; that as a direct and immediate result of said advertising in plaintiff's magazine by foreign advertisers, there develops a commerce between them and residents of New Mexico and other states in the advertised products and merchandise, and there is placed in motion the interstate shipment of goods, sold in original packages and manufactured and stored in states other than to which the said goods are ultimately destined; that accordingly, said contracts between plaintiff and its foreign advertisers, and the advertisements themselves, are transactions in interstate commerce, and the same become instrumentalities of interstate commerce.

[fol. 4] V. That chapter 7 of the Session Laws of New Mexico of 1934, commonly known as the sales tax law, hereinabove referred to, provides for the levy of what is called

an "excise" or "privilege" tax. Section 201, subsection I, provides for the application of said tax to certain businesses as follows:

"I. At an amount equal to 2% of the gross receipts of any person engaging or continuing in any of the following businesses * * * publication of newspapers and magazines (but the gross receipts of the business of publishing newspapers or magazines shall include only the amounts received for the sale of advertising space) * * *"

that for the period embracing May, 1934, to December, 1934, inclusive, and March, 1935, to June, 1935, inclusive, plaintiff's gross receipts from foreign advertisers (of the class described in Paragraph IV hereof) for the sale of advertising space in its said magazine, amounted to $1481.05.

That acting under the purported authority contained in said Chapter 7 of the Session Laws of 1934, The State Tax Commission and the above named defendants, have attempted to levy an assessment against and tax plaintiff on said gross receipts of $1481.05.

That on or about August 16, 1935, defendants made demand on plaintiff for a sum equal to 2% of said $1481.05, to wit, $68.20, and for the additional sums of $6.82 as penalty and $5.25 as interest, or a total of $80.27, and threatened that unless said sum was paid within five days, that the issuing of a warrant to the Sheriff of Bernalillo County, New Mexico, would follow.

That plaintiff, while denying the legality of said tax of $80.27, did on September 10, 1935, pay the sum of $80.27 under protest, reserving all rights to recover the same as provided by law; that plaintiff, in compliance with law, did on September 10, 1935, file a written protest duly veri- [fol. 5] fied under oath, challenging the legality of said tax, setting forth its objections thereto, and notifying the State Tax Commission of New Mexico that suit would be brought to recover said $80.27 so paid under protest; that a copy of said written protest is attached hereto, marked Exhibit "A" and made a part hereof.

VI. That said tax penalties and interest, amounting to $80.27, levied on the gross receipts of plaintiff's foreign advertising for the aforesaid period, and those sections of Chapter 7, laws of 1934 (particularly Section 201) pur-